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Supreme Court, U.S.
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No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In accordance with Rule 15.6 of the United States Supreme Court Rules, petitioner Bernadine Suitum files this reply brief to respond to the additional issues raised by respondent in opposition to Mrs. Suitum's Petition for Writ of Certiorari.

ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT DOES CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT

Respondent Tahoe Regional Planning Agency (TRPA) argues the Ninth Circuit decision in this case does not conflict with the decisions of this Court, particularly with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); or *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). However, TRPA's argument is based on a gross distortion of Mrs. Suitum's position. TRPA suggests Mrs. Suitum is not asserting that she has been denied all viable use of her land but only that she has been denied the ability to build a house on her property. Opposition Brief (OB) at 10-16. This is absolutely incorrect. As TRPA is well aware, throughout this litigation, Mrs. Suitum has argued that TRPA's regulations denied her all viable use of her property. This claim was set forth in the complaint and argued to both the District Court and the Ninth Circuit. First Amended Complaint (Complaint) at ¶¶ 5, 6, and 14; Reply to Opposition to Plaintiff's Cross-Motion for Summary Judgment at 1-3; Appellant's Opening Brief at 18 . The District Court ruled that the effect of TRPA's prohibition on any "land coverage or other permanent land disturbance" on Mrs. Suitum's property is to deny her the ability to "develop *or* build on the parcel of land she owns." App. D at 3 (emphasis added). The question presented for review in this Court is based on the fact that "the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted." Petition at i.

There is no question that Mrs. Suitum has been denied all viable use of her land. She cannot seek an alternative use of her land by means of variance or other procedures and the absolute prohibition against permanent land disturbance is such as to preclude any meaningful use of her property. Unlike a variance, TDRs do not allow Mrs. Suitum the right to put her land to any actual use. TDRs merely transfer that right to another for use on other property. The TDRs offered Mrs. Suitum are, at most, a vague and uncertain prospect of some small economic exchange with a third party. They clearly are not compensation from the government for the loss of all use of property occasioned by the TRPA regulations. There is no certainty as to when or if Mrs. Suitum will ever be able to sell her TDRs or as to what economic return she will get from such a sale.

Under both *Williamson County* and *MacDonald*, Mrs. Suitum has a final agency action with respect to the uses allowed on her property. The Ninth Circuit's conclusion to the contrary is necessarily in conflict with these decisions of this Court.

Respondent claims this Court ruled in *Penn Central* that the existence of a "development right" which could be transferred negated the finding of a taking in that case. OB at 14. That, however, was not the holding of this Court in *Penn Central*.

> The issues presented by appellants are (1) whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a "taking" of appellants' property for a public use within the meaning of the Fifth Amendment, which of course is made applicable to the States through the Fourteenth Amendment ... and, (2) if so, whether the transferable development rights afforded appellants constitute "just compensation" within the meaning of the Fifth Amendment. We need only address the question whether a "taking" has occurred.

Id. at 122.

Thus, rather than hold TDRs negate a taking claim, in *Penn Central* this Court expressly refused to address the TDR issue. Any

further discussion of the issue was dicta. Also, unlike Mrs. Suitum, Penn Central was already engaged in an economically viable use of its terminal property. The issue presented but not addressed by this Court in *Penn Central* was whether the TDRs could be considered a form of "just compensation." *Penn Central* does *not* suggest that TDRs constitute a use of the land as the Ninth Circuit held in this case.

The final agency action meted out to Mrs. Suitum was such as to deprive her of any beneficial use of her land. In fact, Mrs. Suitum has been left with fewer use options on her property than the land owner in *Lucas* where this Court found a per se taking had occurred. State law prohibited Lucas from building a house on his parcels but he could build a deck or boardwalk on his property. *Lucas*, 505 U.S. at 1009 n.2. However, this Court found that was not an adequate beneficial use. In contrast, Mrs. Suitum is not allowed even the token uses left to Lucas. TRPA bans "additional land coverage or other permanent land disturbance" on her property. TRPA Code of Ordinances § 20.4.13, Appendix F to Petition at 4.

It was this very type of draconian regulation that prompted this Court's warning in *Lucas* that

> ... [r]egulations that leave the owner of land without economically beneficial or productive options for its use-typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018.

Mrs. Suitum's position is clear and unequivocal. Mrs. Suitum has been denied all viable use of her property. The sale of TDRs is irrelevant to that determination. Selling TDRs is not a use of Mrs. Suitum's property. The Ninth Circuit has held, however, that the sale of TDRs is an alternative use of property and that to ripen her case, Mrs. Suitum must engage with other private parties for the transfer of those rights before there will be a final decision by the government agency on the use allowed. That decision is contrary to

this Court's holdings in *Williamson County* and *MacDonald* that require only a final determination of how a regulation will affect actual use of the owner's own property. The Ninth Circuit decision is also contrary to this Court's decision in *Lucas* that denial of all economically beneficial or productive use of property is a per se taking requiring just compensation.

II

THE DECISION OF THE NINTH CIRCUIT DOES CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT

Respondent's argument that there is no conflict between the Ninth Circuit's decision in this case and the Seventh Circuit's decision in *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995), is ill-conceived. OB at 18. TRPA asserts the cases are distinguishable because the Seventh Circuit found the ordinance in *Marusic* embodied a conclusive decision about transferability whereas the Ninth Circuit found it could not know whether the TRPA regulations in this case had gone too far until Mrs. Suitum tried to sell her Transferable Development Right. OB at 18. TRPA misses the point.

On the facts in this case, the Seventh Circuit would have ruled the TRPA actions resulted in a conclusive decision that no use would be allowed of Mrs. Suitum's property. The basis for the court's holding in *Marusic* was that a claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Marusic*, 55 F.3d at 261. The court concluded such was the case for Marusic even though he never attempted to sell his store or transfer his liquor license. *Id.* at 261. So it is in this case. A final decision regarding the application of the TRPA regulations to Mrs. Suitum's property has been reached, even if the result of a TDR sale, if any, is unknown. This contrary ruling by the Ninth Circuit *establishes* the conflict between the Circuits this Court should resolve. It does not *preclude* the conflict as respondent seems to suggest.

The court in *Marusic* was not deterred from considering the merits of the case by any lack of effort on the part of Marusic to sell his store, and thereby attempt to transfer his liquor license. The effect of the regulation on his property interest was already apparent

to the court. "The terms of the law are clear, their application straightforward." *Id.* at 261. In fact, the court found there was nothing Marusic could do to avoid the immediate effects of the license moratorium on his property--his store. This is true in the present case. Mrs. Suitum cannot avoid the effects of TRPA's regulations on her property. Mrs. Suitum is prohibited from putting her property to any economically beneficial use. Mrs. Suitum's case was deemed unripe by the Ninth Circuit. However, in the Seventh Circuit, pursuant to the precedent of *Marusic*, Mrs. Suitum's case would have been deemed ripe. This is the very type of inconsistent application of the law caused by a conflict in the Circuits that should be resolved by action of this Court.

III

ALL ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE RAISED IN THE COURTS BELOW

TRPA argues that Mrs. Suitum has improperly raised issues for the first time in her Petition for Writ of Certiorari. OB at 8-9. TRPA is incorrect.

First TRPA claims that Mrs. Suitum never asserted prior to her petition that "the only use of property [is] the ability to construct a residence on it." *Id.* at 8. Mrs. Suitum agrees that she has not made this assertion. Obviously, depending on the physical and regulatory circumstances related to a piece of property, it can be put to all manner of uses. In Mrs. Suitum's case, however, she has asserted from the first stages of the litigation that TRPA has prohibited her from constructing a single-family residence or making any other use of her residentially zoned lot. Complaint at ¶¶ 5, 6, and 14.

Next, TRPA complains that "[n]owhere below did petitioner argue that restrictions prohibiting construction on land amount to a taking per se." OB at 8. TRPA again misstates Mrs. Suitum's position. Mrs. Suitum has alleged all along that TRPA has deprived her "of all reasonable and economically viable use" of her lot. Complaint at ¶ 6. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this allegation, if proven, constitutes a per se taking. As in *Lucas*, TRPA's regulations "leave the owner of land without economically beneficial or productive options for its use ... by requiring land to be left substantially in its natural state." *Lucas*,

505 U.S. at 1018. Thus, the per se taking argument was presented in her complaint by arguing that she was deprived of all economically viable use of her lot.

And last, TRPA claims that by alleging in her petition that the economic impact of TRPA's regulations can be established without marketing her TDRs, Mrs. Suitum has improperly raised a new legal theory as to why her takings claim is ripe. OB at 9. This argument is not, however, a new "legal theory." The actual value of the TDRs has yet to be determined, but that valuation is irrelevant to the finality prong of the *Williamson County* ripeness doctrine which is the basis for the Ninth Circuit's decision. Under *Williamson County*, the decisions of the government agency are final when the impact of the relevant regulation on the uses of the property is certain. In this case, the impact of TRPA's regulation on Mrs. Suitum's property is certain. Mrs. Suitum has been denied all beneficial use of her land.

In any event, as this Court stated in *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992), "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." (Citations omitted.) Mrs. Suitum properly raised her federal takings claim in the courts below and has defended the ripeness of that claim ever since it was put in issue by TRPA. All of Mrs. Suitum's arguments are properly before this Court.

IV

THE ISSUES BEFORE THE COURT ARE ISSUES OF NATIONAL IMPORTANCE

Respondent suggests that because TRPA's TDR program is complicated and limited to the Lake Tahoe Basin, the question of whether a TDR process must be undertaken before a takings claim can ripen is of only local importance. OB at 10. To the contrary, the jurisdictional scope of TRPA's TDR program has no relevance to the legal importance of this case. In fact, every property regulation that comes before this Court is limited geographically because by definition regulation of property use is a matter of local concern. If TRPA's argument had any weight, this Court would never have accepted for review *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (overturning California Coastal Commission's

permit conditions for one house on Ventura coast as constituting an unconstitutional regulatory taking); *Dolan v. City of Tigard*, 512 U.S. ____, 114 S. Ct. 2309 (1994) (overturning one city's permit conditions for enlarging plumbing supply store as constituting an unconstitutional regulatory taking); or for that matter *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (upholding cities' denial of permit under its local zoning regulations to expand vertically Penn Central station as not constituting a regulatory taking). Here, like in *Nollan*, *Dolan*, and *Penn Central*, the Court is presented an issue of fundamental importance to property owners as well as to land use regulatory agencies across the country. Can a TDR scheme like TRPAs be used strategically by regulatory agencies to block a judicial determination of whether a regulatory taking has occurred even though that agency has already denied a property owner all economically viable use of her property? As explained in the Petition for Writ of Certiorari at 16, if allowed to stand, the Ninth Circuit's decision will have effectively overruled the per se regulatory taking rule established by this Court in *Lucas*. The national importance of such an outcome is obvious.

CONCLUSION

Respondent has denied Mrs. Suitum the right to any economic use of her vacant residential lot. Respondent requires that it be left in a natural state. Because there is no mechanism available to change this decision so as to allow Mrs. Suitum any use of her property, Mrs. Suitum's claim for a regulatory taking is ripe, *now*. The Ninth Circuit's decision would force Mrs. Suitum to embark on a quixotic attempt to market TDRs to other regulated property owners before she can file a takings claim. The purported ability to market TDRs, however, does not transform TRPA's *final* determination that Mrs. Suitum cannot put her land to productive use into a *nonfinal* action. The Ninth Circuit has simply conjured another burdensome procedure that a landowner must satisfy prior to seeking judicial relief. But this procedure is divorced from the question of whether an agency has reached a final decision on the use of her property. If this sort of procedure is condoned, there is no end to the creative procedural roadblocks that land use agencies can be expected to invent in order to avoid takings claims. In effect, the Ninth Circuit's

decision, if not overturned, will eviscerate this Court's per se regulatory taking category and expand beyond all anticipation the ripeness standards prescribed by this Court in its previous decisions.

Accordingly, petitioner Bernadine Suitum respectfully urges the Court to grant the Petition for Writ of Certiorari.

DATED: September, 1996.

Respectfully submitted,

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